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Nos. 97-826, 97-829, 97-830 & 97-831

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

FEDERAL COMMUNICATIONS COMMISSION
and the UNITED STATES OF AMERICA,
Petitioners,

v.

IOWA UTILITIES BOARD, *et al.*,
Respondents.

AND RELATED PETITIONS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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CONSOLIDATED BRIEF FOR RESPONDENTS UNITED STATES TELEPHONE ASSOCIATION AND THE RURAL TELEPHONE COALITION

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LIST OF PARTIES AND AFFILIATES

The parties to the proceedings in the Eighth Circuit are listed in Pet. App. at 1a-4a, 73a-79a and 92a.

Pursuant to Rule 29.6 of the Supreme Court Rules, the Rural Telephone Coalition ("RTC") and United States Telephone Association ("USTA") respectfully submit these disclosure statements.

RTC is comprised of the National Rural Telecom Association ("NRTA"), the National Telephone Cooperative Association ("NTCA"), and the Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO"). Each of the associations in the RTC is a non-profit trade association representing the interest of facilities-based local exchange and exchange access providers. These companies are full members of the associations. Some of the associations also have international members who provide local exchange services in other jurisdictions, and associate members consisting of consultants, manufacturers, and other parties with interests in the local exchange carrier industry. Neither the RTC nor any of the associations have any parent companies, subsidiaries, or affiliates for whom disclosure is required by Rule 29.6.

USTA is a non-profit trade association representing the interest of facilities-based local exchange and exchange access providers. These companies are its full members. USTA also has international members who provide local exchange services in other jurisdictions, and associate members including consultants, manufacturers, banks and investors, and other parties with interests in the local exchange carrier industry. USTA has no parent companies, subsidiaries, or affiliates for whom disclosure is required by Rule 29.6.

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STATEMENT OF THE CASE

Respondent United States Telephone Association ("USTA") is a non-profit trade association that represents the interests of more than 1,000 facilities-based local exchange and exchange access providers, most of which are small and mid-sized local exchange carriers ("LECs"). Respondent Rural Telephone Coalition ("RTC") is an alliance composed of three national trade associations, the National Rural Telecom Association ("NRTA"), the National Telephone Cooperative Association ("NTCA") and the Organization for the Promotion and Advancement

of Small Telecommunications Companies ("OPASTCO"), which together represent the interests of more than 850 small and rural incumbent LECs.

In the Court of Appeals, USTA and RTC joined with other parties to challenge the validity of Federal Communications Commission ("FCC" or "Commission") rules governing the price and other central terms of interconnection agreements that must be reviewed and approved by State commissions. USTA and the RTC also separately challenged the validity of two FCC rules of special significance to small and rural carriers: (1) 47 C.F.R. § 51.405, which required State commissions to apply restrictive standards of proof when determining whether small and rural carriers should be relieved of undue burdens imposed by the Act; and (2) 47 C.F.R. § 51.303, which required State commissions to review and approve all interconnection agreements adopted by carriers prior to the effective date of the 1996 Act.

The Eighth Circuit vacated both of these regulations based upon its conclusion that the text of 47 U.S.C. § 251(f) and 47 U.S.C. § 252(a)—which assign States the responsibility for making exemption determinations and reviewing interconnection agreements—also vest States with exclusive jurisdiction to establish the rules governing these State proceedings. The Commission and the other Petitioners have now sought review of these rulings as part of their broad-based challenge to the decision of the Eighth Circuit. *See* FCC Br. at (I) (question 1); AT&T Br. at (i) (question 1); MCI Br. at (i) (question 2); ALTS Br. at (i) (question 2); *see also* FCC Br. at 19, 26 n.9. Petitioners nevertheless fail to provide this Court with any background concerning these regulations or the statutory provisions they implement. That background is presented here.[1]

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[1] This brief only addresses the Eighth Circuit's decision with respect to the two referenced rules of special concern to small

A. The Statutory Framework

Throughout much of this century, States have adopted specially tailored policies designed to maintain the investment incentives of the small and rural carriers that provide service to remote areas.[2] Providing service to rural areas has presented challenging policy issues for many decades because the high cost associated with the delivery of rural service makes it difficult for telephone companies to offer customers affordable rates or to provide investors with attractive rates of return. Small carriers that have made the substantial investment in rural markets are obligated to serve their entire local exchange service areas as "carriers of last resort." As a consequence, these small businesses are particularly vulnerable to "cream skimming" by new entrants that target only high-volume business users in the rural territories. *See, e.g.*, H.R. Rep. No. 81-246, at 8 (1949) (observing that telephone companies were "running their lines down the highways into the most profitable areas and relegating farmers in the less profitable service areas perpetually to a nontelephone hinterland"). Left unchecked, the loss of even one or two high-volume customers in a rural market will drive up the costs of serving the rural LECs remaining residential

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LECs. USTA and RTC join the arguments set forth in the briefs of the Regional Bell Companies and GTE (the "Large LECs") and the Mid-Sized Local Exchange Carriers (the "Mid-Sized LECs") with respect to the other rules at issue in this case.

[2] *See, e.g., AT&T Communications of the Mountain States*, 61 Pub. Util. Rep. 4th 102, 113 (Wy. 1984) (noting that universality of basic service has been "accomplished in Wyoming through years of concerted effort by utilities and this commission"); *Northwestern Bell Tel. Co.*, 71 Pub. Util. Rep. 1, 11 (S.D. P.U.C. 1947) (stating that "it has been the general policy of this Commission to encourage the extension of exchange service into every community and household of the state"); *In re Mountain States Tel. & Tel. Co.*, Pub. Util. Rep. 1916B, 169, 171 (Co. P.U.C. 1915) (requiring defendant telephone company to "make every effort to serve all communities within the State").

customers and/or diminish the economic viability of the rural service providers.[3] State commissions, the FCC, Congress, and economists have long recognized that the efficiency and public policy justifications for introducing competition have been far less apparent in rural markets than in densely populated urban areas where vast economies of scale and lower cost service are possible.[4]

1. In enacting the Telecommunications Act of 1996, Congress fundamentally changed the nature of competition in the markets for local telecommunications services by removing many competitive barriers to entry. But Congress did not renounce decades of special policies designed to enable small companies to provide service and update their networks in rural areas, or the significance of the States' role in fostering the success of these rural ventures. Congress's decision to rely upon the States to develop competition policies tailored to the rural markets is reflected throughout the 1996 Act. *See* 47 U.S.C. § 253(a), (f) (adopting general rule that States may not bar the entry of any telecommunications competitor, except that States may limit competitive entry "in a service area served by a rural telephone company" in certain

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[3] *Cf. Public Service Commission v. Mountain States Tel. & Tel. Co.*, Pub. Util. Rep. 1924C, 545, 560-61 (Mont. P.S.C. 1924) (noting that without following policy of averaging rates over customers of high- and low-cost areas "[i]t is entirely conceivable that . . . a great many of the smaller communities of the state, and possibly all of the rural districts, would be cut off entirely from telephone service by prohibitive rates") (citing *New Castle v. Bell Tel. Co.*, Pub. Util. Rep. 1921B, 378, 380 (Pa. P.U.C. 1921) (same).

[4] *See, e.g.*, John C. Panzar and Steven S. Wildman, "Competition in the Local Exchange: Appropriate Policies to Maintain Universal Service in Rural Areas," at 4-8 (Northwestern Univ. 1993) ("Panzar"), attached to National Comms. Infrastructure (Part 3), Hearings Before the Subcomm. on Telecomms. and Finance of the House Comm. on Energy and Commerce, 103d Cong. (Feb. 8-10, 1994) (testimony of Lawrence C. Ware, Rural Tel. Coalition).

circumstances); 47 U.S.C. § 214(e)(2) (permitting the States to determine whether it would promote the "public interest" to provide universal service funding to more than one telecommunications carrier in a rural market); 47 U.S.C. § 251(f) (authorizing State commissions to terminate exemptions and grant suspensions and modifications of the competition provisions of the Act for small and rural carriers).[5]

Section 251(f) provides the States with two central mechanisms to relieve small and rural telephone companies of undue competitive burdens. Section 251(f)(1) first exempts "rural telephone compan[ies]"[6] from the obligations imposed by Section 251(c) on incumbent carriers to offer competitors interconnection with their facilities and unbundled network elements.[7] States are given express authority to administer this exemption. Section 251(f) directs a carrier seeking interconnection with a rural LEC to "submit . . . its request to the State

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[5] *See also Implementation of the Telecommunications Act of 1996*, 168 Pub. Util. Rep. 4th 89, 96 n.12 (Pa. P.U.C. 1996) (observing that "the interrelationship of [Sections 253(f), 214(e)(2) and 251(f)] is designed to protect rural telephone companies from 'cream skimming' practices by competing carriers," and that "[b]ecause of their small size and limited number of commercial customers, potential 'cream skimming' practices create greater exposure for rural telephone companies").

[6] The definition of a "rural telephone company" is established in 47 U.S.C. § 153(37).

[7] Congress adopted this exemption provision in order to create a "level playing field, particularly when a company or a carrier to which this subsection applies faces competition from a telecommunications carrier that is a large global or nationwide entity that has financial or technological resources that are significantly greater than the resources of the company or carrier." S. Rep. No. 104-23, at 22 (1995) ("Senate Report"); *see also* H.R. Rep. No. 104-204, pt. 1, at 74 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 40 (rural exemption necessary to avoid "significant costs associated with seeking a modification or waiver before the Commission").

commission," and the State commission is authorized to terminate the exemption if it "determin[es]" that the "request [for interconnection] is not unduly economically burdensome," is "technically feasible," and is otherwise "consistent" with certain universal service provisions of Section 254. 47 U.S.C. § 251(f)(1)(A). The Act does not authorize the FCC to conduct *any* proceedings relating to the rural exemption. *See* 47 U.S.C. § 251(f).

Section 251(f)(2) also vests States with authority to grant discretionary relief to any LEC (including a rural telephone company) that has "fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide" (referred to herein as "small companies"). These companies "may petition a State commission" for a suspension or modification of any requirement imposed by Sections 251(b) or (c). 47 U.S.C. § 251(f)(2). Congress accordingly afforded the State commission power to exempt (in whole or in part) small carriers from all of the special competitive obligations imposed on incumbent LECs under the 1996 Act. And this section vests the State commission with authority to grant relief if "[it] determines" that such relief "is consistent with the public interest, convenience, and necessity," and that it is necessary to avoid a "significant adverse economic impact on users of telecommunications services generally," an "undue economic[] burden[]," or a "technically infeasible" request made by a carrier. 47 U.S.C. § 251(f)(2)(A), (B). The FCC is not authorized to conduct suspension and modification proceedings under any circumstance. *See* 47 U.S.C. § 251(f)(2).

2. The 1996 Act also preserved State responsibility for regulating rural carriers' agreements with larger, non-competing LECs. For many years, rural telephone carriers have depended upon "co-carrier" relationships with larger companies to provide efficient service to rural subscribers. *See* Panzar at 34. Such joint arrangements between non-

competing LECs have served to reduce modernization costs and preserve revenues for universal service. For example, Extended Area Service ("EAS") arrangements between rural LECs and their neighboring large LECs enable rural and urban subscribers to call each other without incurring long distance charges. The prices of shared service components for rural LECs under such agreements are generally lower than prices made available to requesting carriers in a competitive marketplace. *See id.* at 41.

Rural carriers entered into hundreds of agreements of this type prior to the effective date of the 1996 Act, and one of the questions at issue in this case is how these agreements are affected by the terms of the Act. As described in the briefs of the large and mid-sized LECs, Sections 251 and 252 of the Act seek to introduce competition through reliance on private party negotiations and State commission review and approval of interconnection agreements. Section 252(a)(1) provides that an incumbent local exchange carrier "may negotiate and enter into a binding agreement with the requesting telecommunications carrier" upon receipt of a "request for interconnection, services, or network elements pursuant to section 251." 47 U.S.C. § 252(a)(1). Section 252(e) in turn provides that "[a]ny interconnection agreement adopted by negotiation or arbitration" under Sections 251 or 252 "shall be submitted for approval to the State commission." 47 U.S.C. § 252(e)(1). The Act does not clearly say whether State commissions must require agreements "negotiate[d] and enter[ed] into" before the effective date of the Act to be submitted to them for review and approval. although it clearly does provide that an agreement which was "negotiated" before the enactment date but executed afterwards must be submitted. 47 U.S.C. § 252(a)(1).

B. The FCC's Implementation of the 1996 Act

There is no dispute that Congress authorized States to adopt implementing regulations to fulfill their obligations to conduct exemption and suspension proceedings under

Section 251(f) and interconnection agreement approval proceedings under Section 252. *See* 47 U.S.C. § 261(b) (stating that "[n]othing in this part shall be construed to prohibit any State commission . . . from prescribing regulations . . . in fulfilling the requirements of this part [including Section 251(f) and Section 252(a)], if such regulations are not inconsistent with the provisions of this part"). The FCC confirmed this reading in its order by acknowledging that "we expect that states will interpret the requirements of section 251(f) through rulemaking and adjudicative proceedings." J.A. at 193. Although the FCC initially acknowledged that "states alone" had authority to make determinations under Section 251(f), J.A. at 11, the FCC nevertheless changed its mind (without explaining why), and decided to prevent States from adopting their own interpretations of central terms of Section 251(f) and Section 252(a) through rulemaking or adjudications. The Commission instead adopted "national rules" and directed States to render exemption and suspension decisions that "conform to our rules." J.A. at 435-36.

The national rule promulgated under Section 251(f) sought to dramatically circumscribe the State commissions' discretion to tailor competitive policies to the special characteristics of their rural markets, and sought to compel State commissions to adhere to an unduly restrictive interpretation of the standards for relief established under Section 251(f). First, Rule 51.405 displaced the three prerequisites for terminating an exemption established under Section 251(f)(1)—technical feasibility, undue economic burden, and consistency with universal service provisions—with a single "embellishe[d]" standard, Pet. App. at 28a, that required termination of any exemption absent proof that the request would impose an "undue economic burden."[8] Second, the FCC determined that an "economic

[8] Although the FCC protested in the Eighth Circuit that it did not really intend to displace the other prerequisites for termination

burden" warranting relief could not include any "economic burden that is typically associated with efficient competitive entry." 47 C.F.R. § 51.405(c), J.A. at 1124. Third, once a bona fide request is made by a requesting carrier, the FCC's rule assigned the burden of proof to the rural telephone company, based on the Commission's unsupported premise that "it is appropriate to place the burden of proof on the party seeking relief from otherwise applicable requirements." J.A. at 196.

The national rule promulgated under Section 252(a) required State commissions to review and approve hundreds of preexisting agreements between non-competing, neighboring LECs, including EAS agreements. The FCC interpreting the language of Sections 252(a) and (e) to require such approval, despite its acknowledgment that such agreements "were negotiated under very different circumstances, and may not provide a reasonable basis for interconnection agreements under the 1996 Act." J.A. at 30.

C. The Decision of the Eighth Circuit

The Eighth Circuit vacated the FCC's pricing regulations because they "exceeded" the FCC's jurisdiction. *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 794 (8th Cir. 1997); Pet. App. at 10a. That determination was based upon an analysis of the text of the provisions governing the States' authority to regulate pricing in local exchange markets. Pet. App. at 9a-24a. The Eighth Circuit also vacated the FCC's nonprice rules where the text of the 1996 Act demonstrated a congressional intent to give the States exclusive jurisdiction to implement those sections of the Act.

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of a rural exemption, the terms of its rule expressly provided otherwise. *See* 47 C.F.R. § 51.405(c), J.A. at 1124 ("In order to justify continued exemption . . . an incumbent LEC must offer evidence . . . . [of] undue economic burden . . . .").

1. The Eighth Circuit vacated the FCC's rules governing State rural exemption, suspension and modification proceedings because the "plain meaning of subsection 251 (f)(1) (governing exemptions) and 251(f)(2) (governing suspensions and modifications) indicates that the state commissions have the exclusive authority to make these determinations." Pet. App. at 28a. The court emphasized that "nothing in either of these provisions, or in the Act generally, provides the FCC with the power to prescribe the governing standards for such determinations." *Id.* In contrast to the "repeated and exclusive" references to State commission determinations in Section 251(f), the Court of Appeals found absolutely "no indication that State commissions must follow FCC standards" in conducting exemption, suspension or modification inquiries. *Id.*

The court found that this conclusion was further confirmed by the fact that Congress had rejected both a Senate bill and a House bill giving the FCC concurrent jurisdiction with State commissions to administer these provisions. *Id.* at 29a. The court held that it would be "unreasonable to infer from subsection 251(d) or the other general rulemaking provisions cited by the FCC that Congress intended to put the Commission—the agency it decided to exclude from the exemption process—in a position to dictate the substantive standards governing the exemption process." *Id.* at 29a-30a.

After resolving the issue based on the language of Section 251(f) alone, the Court of Appeals found that Section 2(b) provided an additional ground for its decision.[9] *Id.* at 30a. The court reasoned that "determinations of

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[9] Section 2(b) of the Act provides that "nothing in this chapter shall be construed to apply or to give the [FCC] jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service." 47 U.S.C. § 152(b).

whether small or rural LECs should receive exemptions, modifications, or suspensions" of interconnection duties qualify as "practices or regulations" which are made "in connection with intrastate communication service" within the meaning of Section 2(b). *Id.* The court declined to address respondents' substantive challenges to the regulation in light of its jurisdictional holding. *Id.*

2. The Eighth Circuit also vacated the FCC's rule requiring State commissions to review and approve all preexisting interconnection agreements. The Eighth Circuit determined that "[n]othing" in Section 252 "can be read to authorize the FCC to issue regulations regarding which interconnection agreements must be submitted for state approval." Pet. App. at 35a. The court emphasized that Section 252 "establishes the procedures and standards that *state commissions* must follow when approving and arbitrating agreements under the Act." *Id.* (emphasis in original).

Acknowledging the FCC's "grasp for some sort of statutorily-based jurisdiction over these interconnection agreements," *id.* at 36a, the Court of Appeals nevertheless concluded that "section 2(b) forecloses the ability of the Commission to determine which interconnection agreements must be submitted for State commission approval." *Id.* at 35a (citation omitted). The Court of Appeals concluded that this issue must be resolved by State commissions. *Id.*

3. The Eighth Circuit also rejected the FCC's attempt to compel States to conform their decisions to its "national rules" for an additional reason. As the Eighth Circuit explained, the FCC's order "purport[ed] to preempt any State policy that conflicts with an FCC regulation promulgated pursuant to section 251." Pet. App. at 36a. Even if the FCC had some "residual authority to prescribe and enforce regulations to implement the requirements of section 251" beyond "the six areas in [Section 251] where Congress expressly called for the FCC's participation," *id.* at 37a, the court found that the FCC exceeded that au-

thority. The court held that two sections of the Act directly addressing the issue of preemption—Section 251 (d)(3) and Section 261—expressly "constrain[] the FCC's authority" to adopt binding national rules. *Id.* at 37a. The court explained that Section 251(d)(3) provides that the FCC cannot preempt State commission orders establishing interconnection obligations so long as they are "consistent with the requirements of section 251" and do not "substantially prevent the implementation of the requirements of Section 251 and the purposes of Part II." *Id.* The Eighth Circuit found that "[t]his provision does not require all State commission orders to be consistent with all of the FCC's regulations promulgated under section 251," because it is "entirely possible for a State interconnection or access regulation . . . to vary from a specific FCC regulation and yet be consistent with the overarching terms of section 251." *Id.* at 38a. It found further support for that conclusion in Section 261(b), which authorizes States to adopt rules that are "not inconsistent with the provisions of this part" to "fulfill[] the requirements of this part," but which does not provide that such rules must conform to FCC regulations. *Id.* at 39a.

On the basis of these sections of the Act, the court concluded that the FCC could not preempt State authority based solely on the theory that it had concurrent jurisdiction to adopt rules under Sections 251 and 252. The FCC could only adopt rules with preemptive force—the authority it purported to exercise here—based upon legally supportable findings that divergent State rulings would contravene "the requirements of [Section 251]" or would "substantially prevent implementation of the requirements of . . . section [251] and the purposes of [Part II]." 47 U.S.C. § 251(d)(3)(B)-(C); Pet. App. at 37a. The FCC made no such findings in its order, and the court rejected the agency's view that "an inconsistency between a state rule and a Commission regulation under section 251 is

sufficient for the FCC to preempt the state rule" as an "unreasonable interpretation of the Act." Pet. App. at 40a.

SUMMARY OF THE ARGUMENT

The 1996 Act fundamentally changed the telecommunications industry by eliminating many barriers to entry and imposing unprecedented requirements to stimulate competition. Congress nevertheless recognized that it was premature to introduce such sweeping changes into the sparsely populated rural markets served by small telephone companies who, along with their customers, could be unfairly burdened by the entry of virtually unregulated competitors seeking to serve only the more profitable segments of the rural market. Congress addressed this issue by affording small carriers relief from many of the most onerous competitive burdens associated with the new law, and entrusted the responsibility for administering this relief to the agencies in the best position to assess the special issues presented in rural markets—State commissions that have been helping to preserve and promote the mission of small and rural telephone companies for most of this century. The Eighth Circuit properly determined that the rules adopted by the FCC to implement the sections of the Act addressing these small carrier issues represent an impermissible attempt to exercise jurisdiction reserved to the States, and undermine the scheme of cooperative federalism that Congress sought to establish.

I. The FCC originally conceded that Congress expressly delegated authority to the States to "prescrib[e] regulations" to implement Section 251(f), and initially concluded in the NPRM that "the states alone have authority to make [such] determinations." J.A. at 11. The text of Section 251 confirms that the FCC had it right the first time. When Congress wanted the FCC to adopt regulations to govern issues in State commission proceedings, it expressly said so. *See, e.g.*, 47 U.S.C. § 251(f)(1)(B) (when States terminate an exemption, they are required

to enter orders establishing a schedule for compliance "that [are] consistent in time and manners with Commission regulations"). The legislative history further confirms that reading. The bills passed by both the House and Senate gave the FCC a role in conducting proceedings designed to afford relief to small companies. Both versions were rejected in conference, however, and the states were given *sole* authority to conduct exemption, suspension and modification proceedings for all small carriers. *See* 47 U.S.C. § 251(f)(1)-(2).

The FCC similarly lacked statutory authority to adopt a rule requiring States to review and approve (or disapprove) *all* interconnection agreements that predated the passage of the Act—an interpretation that would have required State commissions to review hundreds (and perhaps thousands) of preexisting agreements between small carriers and their neighboring LECs. The language of Section 252, however, establishes that Congress only afforded the FCC authority to oversee the process of approving private agreements in the event a State commission refuses to act. 47 U.S.C. § 252(e)(5). It is therefore manifestly unreasonable to conclude that Congress gave the FCC authority to dictate how State commissions should construe their statutory responsibilities with respect to the review of preexisting agreements that involve "almost exclusively . . . local intrastate telecommunication services." Pet. App. at 35a.

Other provisions of the Act further confirm congressional intent to leave these interpretive issues to the State commissions. Although the FCC claims that "Congress divided responsibility between the FCC and the state commissions along the lines of legislative and adjudicatory *function*," that theory cannot be reconciled with three other sections of the Act that expressly address the allocation of rulemaking authority between the FCC and the States. FCC Br. at 37 (emphasis in original). First, Section 261 of the Act authorizes States to adopt *"regu-*

lations" to fulfill their responsibilities under the Act, and those State regulations do not have to conform to Commission regulations. *Compare* 47 U.S.C. §261(b) (authorizing implementing regulations by States that are not "inconsistent with the provisions of this part") *with* 47 U.S.C. § 261(c) (authorizing "additional" state regulations beyond those adopted to "fulfill" State responsibilities under the Act, but only if they are consistent with "the Commission's regulations"). Second, Section 251 (d)(3) strictly limited the FCC's authority to preempt State regulations or orders concerning the LECs' "interconnection obligations" when "prescribing [its own] regulations." Yet the FCC rules at issue plainly exceed that authority by "prescribing . . . regulations" that would "preclude the enforcement" of State rules and orders that are "consistent with the requirements and . . . purposes" of the Act, and the FCC made no contrary finding. 47 U.S.C. § 251(d)(3). Third, confirmation of the Eighth Circuit's interpretation of the FCC's authority is also found in Section 2(b) of the Communications Act, which forecloses the assertion of FCC jurisdiction over intrastate service issues in the absence of an unambiguous grant of authority. Nothing in the Act can even plausibly be read as an unambiguous grant of authority to the FCC over these intrastate service issues. As the FCC's own order recognizes, Sections 251 and 252 "do not contain an explicit grant of intrastate authority." J.A. at 448.

II. The Eighth Circuit's interpretation does not undermine the policies of the Act. The FCC has offered no evidence—and there is none—that the Eighth Circuit's decision has disrupted the State processes for deciding the small carrier issues (or any other issues for that matter). The federal scheme is working better without the FCC's mandatory directives to State commissions on these small company issues because it has allowed States needed flexibility—that the FCC's rules denied—to interpret the Act

in light of the State commissions' knowledge and expertise regarding the status of local competition in their states.

The FCC places substantial reliance on its claim that the Eighth Circuit's interpretation of the FCC's jurisdiction frustrates congressional intent by preventing "a single court of appeals" from "resolv[ing]" the "most fundamental issues arising" under the 1996 Act. FCC Br. at 40. But there is no reason to conclude that Congress shared the Commission's view that this was a paramount goal of the Act. To the contrary, the terms of the Act make clear that Congress was content to allow these statutory issues to be resolved through State proceedings conducted over time. Nothing in the statute required the FCC to adopt any interpretations of Sections 251(f) or 252(a), and Congress did not even grant federal district courts jurisdiction to conduct direct review of State commission determinations issued under Section 251(f). This Court should accordingly conclude, as the Eighth Circuit did, that Congress adopted a program that permits States to develop reasonable interpretations of the Act in the course of conducting the proceedings Congress assigned to them. It did not authorize the FCC to short circuit that important State role in the new regulatory scheme.

ARGUMENT

The FCC's attempt to command the States to render decisions that "conform to [its] rules" was properly rejected by the Eighth Circuit. J.A. at 435-36. Contrary to the FCC's claims, there is a very "coherent textual basis for attributing to the Commission jurisdiction to implement some, but not all, of the core federal standards of the local competition provisions." FCC Br. at 15. The language of the Act firmly supports the Court of Appeals' conclusion that the FCC had no authority to displace (or severely circumscribe) the States' responsibility to implement the relief afforded to small carriers under Section 251(f), or to compel State commissions to review thousands of pre-

existing carrier agreements under Section 252(a), with no discretion to evaluate whether they warrant submission. Nothing about this reading of the Act "raise[s] immense obstacles to effective implementation" of congressional policies. FCC Br. at 39. To the contrary, it promotes them.

I. THE LANGUAGE AND STRUCTURE OF THE 1996 TELECOMMUNICATIONS ACT ESTABLISH THAT THE FCC IMPERMISSIBLY DISPLACED THE STATES' AUTHORITY TO IMPLEMENT THE STATUTORY PROVISIONS AT ISSUE

The FCC looks far and wide to support its claim that "Congress directed [it] to create a national framework for individual state commissions to apply" when conducting proceedings under Section 251(f) and Section 252. FCC Br. at 15; *id.* at 30 (stating that Section 271—which has nothing whatsoever to do with the rural exemption provision—"is powerful evidence that Congress meant to authorize the Commission to create a national regulatory framework that the state commissions would apply in adjudicating particular carrier-to-carrier disputes under Sections 251 and 252"). Several provisions of the Act explicitly address the respective roles of the FCC and the State commissions in the implementation of Section 251(f) and Section 252. It is those express provisions which plainly establish that Congress withheld authority from the FCC to tell State commissions how to conduct and decide the matters Congress entrusted to them.

A. The Text Of Sections 251(f) And 252 Plainly Establishes That The FCC Has Exceeded Its Authority

1. The FCC contends that Congress required it to adopt rules implementing "core federal standards" for the 1996 Act's local competition provisions, including the "criteria by which rural carriers may claim exemption from"

interconnection requirements under Section 251(f). FCC Br. at 18-19. In fact, few provisions in the 1996 Act more clearly illustrate Congress's plan to grant *the States* primary authority to implement important sections of the 1996 Act governing competition in intrastate markets. The Court of Appeals correctly concluded that the "plain meaning" of subsections 251(f)(1) and (2) "indicates that the state commissions have the exclusive authority to make [rural exemption] determinations." Pet. App. at 28a.

The FCC contends that it is unreasonable to infer that Congress "divest[ed] [the] Commission of any role in implementing [the] 'rural exemption' provision of Section 251(f)" based on the fact that Congress "assigned the state commissions *some* role in implementing" the Act. FCC Br. at 26 n.9 (emphasis in original). A review of Section 251(f), however, hardly supports the view that Congress just gave State commissions "some" role in implementing Section 251(f)—States were given the *sole* role. As the Eighth Circuit found, subsection 251(f)(1)(B) "explictly provides [that], '*The State commission* shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subsection paragraph (A).'" Pet. App. at 28a (emphasis added). The court emphasized that there are "[r]epeated and exclusive references to such state commission determinations . . . contained throughout subsection 251(f)," while "[i]n contrast, there is no indication that state commissions must follow FCC standards in conducting these inquiries." *Id.*

As the Eighth Circuit further found, Congress "is capable of clearly expressing its desire to grant the FCC authority . . . when it wishes to do so," and it did so in a number of instances. Pet. App. at 14a.[10] Yet Congress

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[10] Under the statute, the FCC is specifically authorized to issue regulations under subsections 251(b)(2) (number portability), 251(c)(4)(B) (limitations on resale), 251(d)(2) (unbundled network elements), 251(e) (numbering administration), 251(g) (con-

did not direct State commissions conducting exemption, suspension, and modification proceedings to make those determinations in conformity with Commission regulations. Instead, Congress indicated that States were only required to enter orders establishing "an implementation schedule" for compliance "that is consistent in time and manner with Commission regulations" once they have concluded that the termination of an exemption is warranted. 47 U.S.C. § 251(f)(1)(B); *see* Pet. App. at 29a. The fact that Congress only directed State commissions to adhere to specified Commission regulations "[u]pon termination of [an] exemption" negates any inference that Congress impliedly authorized the FCC to adopt other rules governing a State commission's resolution of requests pertaining to exemptions under Section 251(f). 47 U.S.C. § 251 (f)(1)(B).[11]

The FCC's claim that Congress intended rural exemption determinations to be governed by federal regulations is further undermined by the fact that Congress expressly rejected versions of Section 251(f) which gave the FCC concurrent jurisdiction with State commissions to administer the exemption and waiver provisions for small local

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tinued enforcement of exchange access), and 251(h)(2) (treatment of comparable carriers as incumbents). Pet. App. at 12a n.10, 29a n.23.

[11] Indeed, the interpretation of the 1996 Act that the FCC has advocated would render this language of Section 251(f)(1)(B) superfluous. Under the Commission's reading of the Act, all of the State commission's determinations under Section 251(f) must "comply with the Commission's regulations." J.A. at 455. But if the FCC already possesses broad authority to adopt regulations implementing Section 251(f) as it alleges—regulations which the States would be obligated to apply in resolving requests for relief under that section—it would have been completely unnecessary for Congress to direct the States to adopt an implementation schedule that conformed to Commission regulations. It is apparent, therefore, that Congress simply did not authorize the Commission to adopt any other regulations implementing Section 251(f).

exchange carriers. The Senate bill provided that the Commission *or* a State could provide small companies with relief from the obligations of Section 251. *See* S. 652, 104th Cong. § 251(i) (1995); Senate Report at 22. The House bill gave State commissions authority to administer exemption and waiver provisions for rural telephone companies, but also gave the FCC authority to grant waivers for any local exchange carrier with fewer than 500,000 access lines installed. *See* H.R. 1555, 104th Cong. § 242 (e)-(g) (1995). Both of these bills were rejected in conference, and the States were given *exclusive* authority to conduct exemption, suspension and modification proceedings for all small carriers. *See* 47 U.S.C. § 251(f)(1)-(2). The FCC's effort to claim dual jurisdiction to control the resolution of exemption proceedings in State commissions after Congress deliberately excluded the FCC from the process was correctly rejected by the Court of Appeals. *See* Pet. App. at 29a; *Russello v. United States*, 464 U.S. 16, 23 (1983) (declining to adopt an interpretation at odds with changes in the language of a bill).

The language and history of Section 251(f) makes its intent plain. Congress determined that State agencies are better situated to evaluate the special concerns of rural areas, and to administer provisions designed to shield small companies operating in their jurisdictions from unduly harmful effects of the new obligations. Under these circumstances, it is unreasonable to infer that Congress nevertheless meant to put the FCC—the agency it decided to exclude from the exemption process—in a position to dictate the substantive standards that States should apply in their own agency proceedings (let alone to rewrite the statutory standard).

2. Subsections 252(a) and (e) of the Act require interconnection agreements to be approved by State commissions. In its pursuit of increased competition at any cost, the FCC determined that States must review and

approve (or disapprove) all interconnection agreements that predated the passage of the Act. The FCC reached this conclusion even though the State of Wisconsin, for example, had interpreted Section 252(a) to exclude agreements executed before the effective date, and explained the unwarranted burdens the FCC's interpretation would impose on State commissions. Petition for Reconsideration by Public Service Commission of Wisconsin, *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (Sept. 30, 1996). Under this interpretation, hundreds upon hundreds of contracts negotiated under "very different" competitive circumstances, J.A. at 30, must be reviewed by State commissions. The Eighth Circuit correctly vacated the rule based upon its finding that State commissions—not the FCC—were given authority to interpret the scope of their own obligations under this section.

As set forth in the Eighth Circuit's opinion, the FCC's jurisdiction to adopt regulations implementing the 1996 Act is limited in scope. Section 252 of the 1996 Act establishes the process and standards that *States* must follow when arbitrating and approving interconnection agreements. The FCC's role under this section is extremely circumscribed—indeed, it is limited only to stepping in to oversee the arbitration process in the event that a State commission refuses to act. *See* 47 U.S.C. § 252(e)(5). The text and structure of Section 252 cannot reasonably be read to confer upon the FCC the authority to implement regulations specifying the obligations of interconnectors to submit their agreements for approval under subsections 252(a) and (e). As the court found, these agreements "almost exclusively involve local intrastate telecommunication services," Pet. App. at 35a, where Congress has traditionally relied upon State commissions to regulate competition. The fact that Congress has established limited standards to guide the exercise of the States' discretion does not mean that the FCC is the final arbiter of

how the States should implement those standards. The Eighth Circuit correctly determined that Congress assigned that role to the States.

B. The Eighth Circuit's Rejection Of The FCC's Authority To Adopt Mandatory Rules Implementing Sections 251(f) And 252 Is Firmly Grounded In Other Provisions Of The Act

In an effort to find some justification for its blanket preemption of the States' authority to interpret the sections of the Act they alone must administer, the FCC claims that "Congress divided responsibility between the FCC and the state commissions along lines of legislative and adjudicatory *function*." FCC Br. at 37 (emphasis in original). According to the Commission, Congress wanted it to make the rules, and wanted the State commissions to apply them. That division of responsibility is not, of course, reflected in the language of Section 251(f) or Section 252(a), and it is contradicted by three other sections of the Act that expressly address the allocation of authority between the FCC and the States.

1. The FCC does not even attempt to reconcile its theory concerning Congress's division of responsibility with Section 261 of the Act. That section plainly establishes that Congress did not relegate State commissions to an adjudicatory role. Instead, it authorized States to adopt "regulations" to fulfill their responsibilities under the Act, including Sections 251(f) and 252(a), and provided that the States' implementing regulations need not conform to Commission regulations. Section 261(b) is explicit: "[*n*]*othing in this part* shall be construed to prohibit any State commission . . . from prescribing regulations . . . in fulfilling the requirements of this part [including Section 251(f) and Section 252(a)], if such regulations are not inconsistent with the provisions of this part." 47 U.S.C. § 261(b) (emphasis added). Nor can the FCC reasonably contend that State commission regulations are "incon-

sistent with the provisions of this part" whenever they are inconsistent with regulations adopted by the Commission. Any such construction is foreclosed by the language of the very next subsection, Section 261(c). That section expressly requires States to conform their rules to "the Commission's regulations" if they seek to adopt "additional" regulations beyond those enacted under Section 261(b) to "fulfill[] the requirements of this part." 47 U.S.C. § 261 (b), (c). If Congress truly had intended to conform State implementation of the Telecommunications Act of 1996 to FCC regulations, it would have said so explicitly, as it did in Section 261(c). Instead, Congress clearly granted the States the autonomy to implement the Act in the first instance, and not merely to "apply" a preordained, FCC-defined "framework" as the agency suggests. FCC Br. at 9.

Although the Commission unsuccessfully attempted to distinguish the application of Section 261 before the Eighth Circuit, *see* Pet. App. at 39a, the Commission *does not even mention* the provision here. Nevertheless, Section 261(b) contains an explicit recognition that the States have authority to "prescrib[e] regulations" to "fulfill[] the requirements of this part."[12] The FCC's attempt to impose binding regulations that States must follow in exemption, suspension and modification proceedings, or with respect to Section 252(a) carrier agreement filings, accordingly cannot be reconciled with the Act.

2. Section 251(d)(3) further confirms that State commissions are not obligated to implement Section 251(f) and Section 252(a) in accordance with national regulations adopted by the FCC. Under that section, Congress prohibited the FCC from "prescribing . . . regulations" that would "preclude the enforcement" of any State "regu-

[12] The FCC itself recognized in its order that "we expect that states will interpret the requirements of section 251(f) through rulemaking and adjudicative proceedings." J.A. at 193.

lation, order or policy" establishing "access and interconnection obligations of local exchange carriers" which is "consistent with the requirements and . . . purposes" of the Act. 47 U.S.C. § 251(d)(3). Yet that is exactly what the Commission has sought to do by establishing a uniform national rule governing any "order" issued by the State in Section 251(f) and Section 252 proceedings which "establish[] the . . . obligations of local exchange carriers." *Id.*

The Eighth Circuit correctly observed that Section 251(d)(3)'s requirement of "consisten[cy] with the requirements of section 251" does not necessarily mean "consisten[cy] with all of the FCC's regulations promulgated under section 251." Pet. App. at 37a. The Court of Appeals recognized that, given the specific way the text of the provision is drafted, "[i]t is entirely possible for a state interconnection or access regulation, order or policy to vary from a specific FCC regulation and yet be consistent with the overarching terms of section 251." *Id.* at 38a. The FCC responds in conclusory fashion, claiming that it is "illogical to presume that Congress withheld" a binding "interpretive role"—apparently with respect to every issue that arises in Section 251(f) and Section 252 proceedings —"from the agency to which it gave preemptive authority." FCC Br. at 23 n.7.

That reading makes no sense. Congress clearly knows how to draft a preemption provision. And if Congress had intended to permit the FCC to preempt categorically any "regulation, order, or policy of a State commission" establishing "access and interconnection obligations," it would have simply said so. Instead, Congress dramatically circumscribed whatever rulemaking authority the FCC has by *prohibiting* the FCC from "preclud[ing] the enforcement of any [State commission] regulation, order, or policy" when "prescribing [its own] . . . regulations to implement the requirements of this section," except in

limited circumstances.[13] 47 U.S.C. § 251(d). As the Court of Appeals found, Section 251(d)(3) emphatically "does *not* support the FCC's view" that "state rules must conform to the Commission's regulations." Pet. App. at 39a (emphasis added).

3. Confirmation of the Eighth Circuit's interpretation of the FCC's authority is also found in Section 2(b) of the Communications Act.[14] As the Court of Appeals explained, "determinations of whether small or rural LECs should receive exemptions, modifications, or suspensions of such duties also qualify as practices or regulations 'for or in connection with intrastate telecommunications service' that are outside of the FCC's jurisdiction by the operation of section 2(b)." Pet. App. at 30a (quoting 47 U.S.C. § 152(b)). And the court was also correct in concluding that Section 2(b) "forecloses the ability of the Commission to determine which interconnection agreements" governing intrastate service "must be submitted for state commission approval." *Id.* at 35a. The flaws in the FCC's analytical efforts to avoid the straightforward operation of Section 2(b) are set forth fully in the briefs of the large and midsized LECs. Their arguments apply equally to the small and rural company issues addressed here, and Respondents USTA and RTC accordingly join those briefs. Here we emphasize two points.

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[13] The limited scope of the FCC's preemptive authority is also confirmed by 47 U.S.C. § 253(d). Even under that section, which explicitly provides for FCC preemption of state regulations that function as barriers to entry, the FCC cannot preempt a state regulation erecting barriers to entry in violation of Section 253(a) or (b) without first providing notice and the opportunity for comment.

[14] That provision of the Act provides that "nothing in this chapter shall be construed to apply or to give the [FCC] jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service." 47 U.S.C. § 152(b).

First, the Commission's contention that Section 2(b) is inapplicable because the Congress has "straightforward-[ly]" subjected competition in local telecommunications markets to federal regulation, FCC Br. at 33-34 (citing *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 377 (1986)), is without merit. Nothing in the Act can even plausibly be read as an unambiguous grant of authority to the FCC over intrastate service issues, as the *FCC itself has recognized. See* J.A. at 448 (acknowledging that Sections 251-252 "do not contain an explicit grant of intrastate authority"); J.A. at 7-8 (observing that States historically have regulated competition in local service areas). Instead, Congress has "straightforward[ly]" preserved State authority by giving State commissions—not the FCC—responsibility for implementing small company policies established by the Act.

Second, the FCC's suggestion that the consideration of the conditions that rural carriers face in particular local markets, or the policy merits of filing hundreds of thousands of EAS and other locally-oriented carrier-to-carrier agreements, is "inextricably" both interstate and intrastate in character, FCC Br. at 35, is simply wrong. The exemption, suspension and modification proceedings under Section 251(f), for example, determine the extent to which competitive obligations should be imposed on small and rural carriers to provide "telephone exchange service in [a local] area." *See* 47 U.S.C. § 251(h)(1). The FCC has conceded that "telephone exchange service" is a "local, intrastate service." J.A. at 449. There accordingly can be no question that the rule at issue represented the assertion of FCC "jurisdiction with respect to . . . classifications, practices, . . . or regulations for or in connection with intrastate communication service," within the meaning of Section 2(b). 47 U.S.C. § 152(b); *see Louisiana*, 476 U.S. at 370 (noting that "this provision fences off

from FCC reach or regulation intrastate matters—indeed, including matters 'in connection with' intrastate service").

C. The FCC's Rules Cannot Be Upheld On The Basis Of *Chevron*

The FCC's appeal to *Chevron* deference, *see* FCC Br. at 42 (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)); *see also* FCC Br. at 17, is unavailing. As a threshold matter, *Chevron* has no role to play when the agency's interpretation does not reflect a reasonable reading of congressional intent, *see Lechmere, Inc. v. NLRB*, 502 U.S. 527, 539 (1992), and the FCC's reading of its authority to interpret Sections 251(f) and 252(a) assuredly was not.

In addition, the application of *Chevron* makes little sense where, as here, the FCC shares responsibility for administration of the statute with other governmental bodies. *See Bowen v. American Hospital Ass'n*, 476 U.S. 610, 642 n.30 (1986) (where administration of a statute is shared among agencies, there "is not the same basis for deference predicated on expertise" as in other contexts); *Rapaport v. United States Dep't of Treasury, Office of the Thrift Supervision*, 59 F.3d 212, 216 (D.C. Cir. 1995) (no *Chevron* deference where Congress delegated statutory responsibility to at least three other agencies), *cert. denied*, 516 U.S. 1073 (1996). The deference afforded under *Chevron* is based upon the premise that Congress would have wanted courts to defer to reasonable interpretations advanced by the agency given responsibility for implementing the statute. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) (observing that a "precondition" to *Chevron* deference is a congressional delegation of administrative authority); *cf. Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J. concurring) (rejecting *Chevron* deference where statute "is not administered by any agency but by the courts"). *Chevron* deference is accorded to agencies "because of a presumption that Congress, when it left

ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency." *Smiley v. Citibank (South Dakota), N.D.*, 517 U.S. 735, 740-41 (1996). But Section 261(b) clearly establishes that the *States* have such implementing and interpretive authority under Section 251(f) and 252(a), and Congress unquestionably circumscribed the FCC's authority to displace that power.

Under these circumstances, where the States in fact possess the "historical familiarity and policymaking expertise" with respect to local rural service issues and intrastate carrier-carrier agreements, *Martin v. OSHRC*, 499 U.S. 144, 153 (1991), it would be at least as reasonable—in fact more reasonable—to afford deference to the *States'* interpretations of these provisions.[15] There certainly is no language of delegation anywhere in the 1996 Act that supports the notion that the FCC's views should trump those of the States, or of the courts, on this question. Given the breadth and intrusiveness of the FCC's proposed rules, deference to the Commission is not appropriate. *Cf. Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) (before interpreting statute to accord "state-displacing weight" to federal law, it "must be absolutely certain that Congress intended such an exercise"); *United States v. Bass*, 404 U.S. 336, 349 (1971) (requiring "clear statement" by Congress in "traditionally sensitive areas, such as legislation affecting the federal balance"); *Amos v. Maryland Dep't of Public Safety & Correctional Servs.*, 126 F.3d 606-07 (4th Cir. 1997) (declining to defer to federal administrative agency's interpretations of ambiguous federal statute, "however reasonable," where there are "enormous" implications for the "balance of power between Federal Government and the States").

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[15] Indeed, as the Large LECs explain, the very presumption written into the text of the Communications Act on these intrastate matters is that they are completely "fence[d] off" from the FCC's reach. *Louisiana*, 476 U.S. at 370; 47 U.S.C. § 152(b).

II. THE EIGHTH CIRCUIT'S INTERPRETATION DOES NOT UNDERMINE THE POLICIES OF THE ACT

The FCC attempts to bolster the weaknesses in its textual arguments with broad assertions that competition in "local telephone markets" is being "impede[d]," FCC Br. at 39, because the FCC has not been granted *carte blanche* to dismantle the framework of cooperative federalism that Congress intended with respect to the implementation of Sections 251-252. Contrary to the FCC's claims, Congress *did* "leave room"—indeed, plainly intended—to give 50 State commissions latitude to define the precise contours of determinations related to rural telephone company exemptions, suspensions, and modifications, and the filing of co-carrier agreements, in the context of competition issues and conditions now arising in their local market. There is no practical reason to revisit the wisdom of Congress's choice.

1. Contrary to the FCC's assertions, the Section 251-252 framework of private party negotiation and State commission arbitration crafted by Congress has been working well since the Act's passage to foster the emergence of local exchange competition. To date, *thousands* of local interconnection agreements have been signed since the Act's passage, with new competitors emerging each day in local telephone markets. *See* Roy Neel, President, United States Telephone Association, *En Banc Presentation on State of Local Competition before the FCC* (Jan. 29, 1998) (observing that by November 1997, incumbent LECs had signed more than 2,400 voluntary agreements with 280 local service competitors). That process would be even more effective if the FCC had not decided, in the most intrusive manner possible, to inject itself into the private party negotiation and State commission arbitration processes. Congress intended private parties first, and then the States, to be the impetus for the development of local

competition. Congress did *not* invite the FCC to introduce more than 700 pages of binding federal guidance into Congress's "pro-competitive, de-regulatory" program.

2. The FCC also has offered no evidence that the Eighth Circuit's decision has disrupted the State processes for deciding the small carrier issues discussed herein. As a practical and policy matter, Congress's deference to the States with respect to local interconnection matters generally, and with respect to rural exemption and interconnection agreement filing issues in particular, makes perfect sense. The State commissions are the agencies with the specific knowledge and expertise regarding the status of local competition in their States, and the particular carriers that are either incumbent, emerging and/or at risk when local competition is introduced.

Two examples illustrate the fact that Congress's scheme is working better without the FCC's mandatory directives to State commissions on these small company issues. The Alabama Public Service Commission recently considered the "financial and technical limitations of [Alabama's] small LECs"; found that the interconnection obligations imposed by subsections 251(b) and (c) would impose undue economic burdens; and temporarily suspended those obligations pending further review of "the effects of competitive entry" on Alabama's rural carriers. *In re All Telephone Cos. Operating in Alabama*, No. 24472 (LEXIS, Pub. Util. Rep. 4th, slip op.) (Oct. 8, 1996). Significantly, that determination was based upon a reasonable interpretation of the Act *without* reference to the FCC's "embellishe[d]" and restrictive standard of proof for rural exemption, suspension and modification proceedings, Pet. App. at 28a, which otherwise could have undermined Alabama's ability to shape competition policy in accordance with the needs of its small carriers and their customers.[16]

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[16] Congress established that State commissions could not terminate an exemption or deny a suspension or modification, when the

Similarly, some State commissions have been assessing what types of agreements should be filed under Section 252(a) pursuant to their own reasonable interpretations of the Act. Minnesota, for example, has commenced a proceeding to determine whether EAS agreements, which are of enormous importance to small and rural carriers, in fact represent the type of agreements that should be subject to Section 252(a) filing and approval requirements. *See In re U.S. West Communications, Inc.*, No. P-421, 1997 WL 634623 (Minn. P.U.C. June 24, 1997). Under the FCC's mandatory rules, that inquiry would have been foreclosed because the FCC determined that all preexisting agreements, including EAS agreements, had to be filed with State commissions. *See* J.A. at 1111 (text of 47 C.F.R. § 51.303).

The actions unfolding in the States illustrate the problem with the FCC's emphasis on the alleged practical and policy need for "nationally consistent interpretations" regarding local competition issues. FCC Br. at 40. Con-

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imposition of certain obligations under Section 251 would be "unduly economically burdensome." *See* 47 U.S.C. § 251(f)(1)(A) and (2)(A)(ii). This was the standard that Alabama applied. Section 51.405(c) and (d) of the FCC's new rules, however, would have required proof of an "undue economic burden" other than an "*economic burden that is typically associated with efficient competitive entry*." 47 C.F.R. § 51.405(c), (d) (emphasis added). Under this new "efficient competitive entry" standard—which appears *nowhere* in the statutory text—State commissions such as Alabama would have been required to disregard losses that would threaten the viability of a rural telephone company if such losses would be attributable to the entry of a more efficient competitor seeking to serve part of a rural market. The FCC's interpretation completely ignores the fact that Congress understood the need to give States substantial latitude to mitigate the impact of the Act on rural telephone companies and their customers. *See, e.g.*, 47 U.S.C. §§ 253(f), 214(e); *see also* 47 U.S.C. § 613(d)(3), (e) (defining an "undue burden" in another section of the Communications Act to include any "significant difficulty or expense"); *Air Line Pilots Ass'n Int'l v. Civil Aeronautics Bd.*, 494 F.2d 1118, 1125 (D.C. Cir. 1974) (interpreting similar phrase in statute creating small carrier exemption from economic regulatory provisions of the Federal Aviation Act to reflect intent to keep small carriers "economically viable").

gress's point in crafting the Section 251-252 regime in fact was (and is) just the opposite: except for certain discrete matters where federal involvement is required by the Act, local competition determinations should be market-specific, not "nationally uniform." [17]

3. The FCC places substantial reliance on the claim that the Eighth Circuit's interpretation of the FCC's jurisdiction frustrates congressional intent by preventing "a single court of appeals" from "resolv[ing]" the "most fundamental issues arising" under the 1996 Act "soon after the Act's enactment." FCC Br. at 40. But there is no reason to conclude that Congress shared the Commission's view that this rulemaking proceeding should culminate in uniform national rules—*even* if Congress had given the Commission concurrent juisdiction to address these issues.

There is no dispute that Congress expected States to adopt interpretive rules when conducting rural exemption and interconnection proceedings, and that Congress did not *require* the FCC to adopt rules on the statutory questions at issue here. Congress was accordingly content to allow these issues to be resolved through State proceedings conducted over time. In addition, as the Eighth Circuit held, Congress did not allow the FCC to establish nationally uniform standards which categorically preempt contrary State rules. The Eighth Circuit rejected the FCC's view that its rules can "preempt any [different] state policy" as "untenable." Pet. App. at 36a. As discussed *supra* at I.B., the FCC's assertion that State decisions implementing Section 251 and 252 must conform to FCC regulations, even where Congress did not say so, is refuted by Sections 261(b) and 251(d)(3). Nor did Congress create a scheme where federal district courts would

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[17] This does not mean, of course, that States cannot follow the FCC's implementation approaches on rural exemption or LEC-LEC agreement filing issues, provided that such approaches are consistent with the Act. Indeed, various States have done so. But Congress clearly intended the States to implement the Act in accordance with their individual assessment of local market conditions, irrespective of whether the FCC might take a divergent position.

"supply nationally consistent interpretations" for all of the provisions construed by the FCC in its rules, as the FCC contends. FCC Br. at 40. Congress did *not* grant federal courts jurisdiction to conduct direct review of State commission determinations issued under Section 251(f) (except insofar as such issues might arise in connection with review of State commission arbitration orders). *Compare* 47 U.S.C. § 252(e)(6) *with* 47 U.S.C. § 251(f).

There is accordingly no reason to presume that Congress thought that all central issues of statutory interpretation arising under Sections 251 and 252 should be adjudicated in a single federal court proceeding. Instead, this Court should find that Congress adopted a program that permits States to develop reasonable interpretations of the Act in the course of conducting the proceedings Congress assigned to them. Short-circuiting that process in the name of litigation expediency undermines the State's role in the statutory scheme without any justification in the text of the statute.

CONCLUSION

For the reasons set forth, respondents respectfully request this Court to affirm the decision of the Court of Appeals.

Respectfully submitted,

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